Section-by-Section Description of the
"Restoration of Fairness in Immigration Law of 2002"
(March 7, 2002)

TITLE I – DUE PROCESS IN IMMIGRATION PROCEEDINGS

Subtitle A – Due Process in Expedited Removal Proceedings

Sec. 101. Due Process in Admissibility and Asylum Cases. – Restores the right of persons seeking admission to the United States to have a due process hearing on admissibility before an immigration judge and, if the person is an asylum seeker, on the merits of an asylum application. The decisions of the immigration judge can be appealed to the Board of Immigration Appeals and to the federal courts.

This due process right may be suspended only in the event of an "extraordinary migration situation," namely, the arrival or imminent arrival of persons in such large numbers or under such unusual circumstances that the Attorney General finds it necessary to suspend the normal inspection and examination process temporarily. In such extraordinary circumstances, the Attorney General would be authorized to employ expedited removal proceedings for 90 days, and would be required to consult the Judiciary Committees of the House and Senate before employing expedited removal proceedings for additional 90-day periods.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[1] ("IIRIRA") virtually eliminated essential due process safeguards in cases where an immigration officer believes that the person seeking admission is inadmissable because of alleged fraud or misrepresentation or in the absence of appropriate documents.[2] In these cases, known as "expedited proceedings," the immigration officer's decision is subject only to review by a non-lawyer supervisor, and if the supervisor agrees with the decision, the alien is removed from the United States summarily.[3] (The only exception is where the individual is placed in an expedited asylum proceeding to determine whether he or she has a "credible" fear of persecution.[4]) Moreover, under IIRIRA, individuals excluded in this manner are subsequently inadmissible for a period of at least five years.[5]

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[1]Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996), as amended by Pub. L. 104-302, 110 Stat. 3656 (October 11, 1996). The bill also applies to largely overlapping provisions included in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996),

[2]Section 302(a) of IIRIRA.

[3]Section 235(b)(1)(A) of the INA, 8 U.S.C. § 1225(b)(1)(A)

[4]The term "credible fear of persecution" means that "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." Section 235(b)(1)(B)(v) of the INA, 8 U.S. C. § 1225 (b)(1)(B)(v).

[5]Section 212(a)(9) of the INA, 8 U.S.C. § 1182(a)(9).

IIRIRA's elimination of due process rights for asylee candidates struck at the very heart of our system of justice and abrogated our nation's historic commitment to granting asylum candidates a meaningful opportunity to establish that they have been persecuted by oppressive foreign governments. Rather than fostering greater "efficiency," IIRIRA merely served to prevent persecuted individuals from effectively asserting their rights under U.S. law.

Sec. 102. Using Immigration Judges in Expedited Removal Proceedings. – Provides that immigration judges will make decisions on admissibility if an "extraordinary migration situation" occurs and expedited removal proceedings are necessary for a 90-day period.

This change is needed to ensure that decisions made during periods in which expedited proceedings are employed will be made by qualified adjudicators. Under IIRIRA, such decisions are made by immigration officers who are not trained as judges or even as lawyers.

Sec. 103. Equitable Determination of "Credible Fear of Persecution" in Cases Involving Unique Fact Patterns. – Provides that a person involved in an expedited asylum proceeding during an extraordinary migration situation will be able to establish that a full asylum hearing is warranted on the basis of a novel factual situation or a new legal argument.

Under IIRIRA, persons involved in expedited removal proceedings seeking a hearing on an asylum application must show a "significant possibility" of being able to succeed.[6] This can be highly problematic for individuals basing their persecution claim on a novel factual situation or a new legal argument. It can be very difficult to determine whether the person has a "significant possibility" of prevailing on a claim or argument that has never been considered before. This section prevents such claims from being rejected simply because they have not previously been accepted.

To illustrate, in 1994, when Fauziya Kasinga was 19 years old, she fled from Togo to avoid becoming a victim of female genital mutilation. At that time, there was no precedent for granting asylum on that basis. Fortunately for Ms. Kasinga, however, IIRIRA had not been enacted yet. She was able to pursue her asylum application on its merits in administrative proceedings and ultimately received asylum.[7] Under IIRIRA, Kasinga's claim almost certainly would have been rejected out of hand because it would have been extremely difficult in expedited proceedings for her to have established a "significant possibility" of prevailing on the basis of such an unusual claim.

Subtitle B – Judicial Review in Immigration Proceedings

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[6]Section 208 of the INA, 8 U.S.C. § 1158.

[7]*Matter of Kasinga*, Interim Decision 3278 (BIA 1996).

Sections 111 – 117. This subtitle overturns provisions in IIRIRA which strip the courts of jurisdiction over certain immigration-related matters. In particular, IIRIRA eliminated court appeal rights relative to decisions on apprehension and detention of foreign nationals, document fraud waivers, orders issued in absentia, and denial of requests for voluntary departure.[8] Judicial review is not a luxury or a gift; it is the very foundation of our system of government and justice. Moreover, judicial review is not just a tool of fairness and equity, it also is an efficiency tool that makes national uniformity possible and is an essential component of our constitutional system of government.

The changes made by IIRIRA have created so many logistical and constitutional problems that many judges have found other ways of hearing at least some of these cases. For instance, the First,[9] Second,[10] and Ninth,[11] Circuits have upheld the right to judicial review of certain habeas corpus deportation orders. Although these cases may help individual foreign nationals, they do not effectively address the broader problem of uniformity or justice. The decision of a district court in habeas corpus proceedings does not necessarily bind the Board or the INS in other cases.[12] This subtitle strikes the court-stripping provisions of IIRIRA and substitutes the pre-IIIRIRA provisions as the procedures for the judicial review.

Sec. 111. Judicial Review of Administrative Remedies and Habeas Corpus. – Restores pre-IIRIRA provisions providing for judicial review in habeas corpus proceedings of final orders of removal. Prohibits review of an order of removal if the petitioner has not exhausted his or her administrative remedies under the INA and its regulations or if the person has departed from the United States after the issuance of the order.

Sec. 112. Judicial Review of Asylum Determinations. – Restores pre-IIRIRA provisions concerning judicial review of exceptions to asylum eligibility.

Sec. 113. Judicial Review of Decisions Concerning Apprehension and Detention of Aliens. – Restores pre-IIRIRA provisions authorizing judicial review of decisions on the apprehension and detention of foreign nationals.

Sec. 114. Judicial Review of Decisions Concerning Waivers. – Restores pre-IIRIRA provisions concerning judicial review of waivers of inadmissibility.

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[8]Section 242 of the INA, 8 U.S.C. § 1252.

[9]*Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998).

[10]*Henderson v. Reno*, Nos. 97-2599, 97-2600, 97-2629, 97-4050, 97-4070 (2d Cir. Sept. 18, 1998).

[11]*Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998).

[12]*See Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989).

Sec. 115. Judicial Review of Orders Issued in Absentia. – Restores pre-IIRIRA provisions concerning judicial review of removal orders issued in absentia with regard to (i) the validity of the notice provided to the foreign national, (ii) the reason for the foreign national's not attending the proceedings, and (iii) whether or not the foreign national is removable.

Sec. 116. Judicial Review of Denial of Request for Order of Voluntary Departure. – Restores pre-IIRIRA provisions concerning court jurisdiction over an appeal from a denial of a request for the privilege of voluntary departure in lieu of deportation.

Voluntary departure permits someone who has been found deportable to leave the United States on his own instead of being escorted out of the country by the INS pursuant to a deportation order. Allowing persons the right to appeal a denial of voluntary departure gives them an opportunity of avoiding the devastating legal consequences of having been deported. For example, IIRIRA made such people inadmissible for five years following a first removal and for 20 years after a second removal.[13]

Sec. 117. Transitional Changes in Judicial Review. – Repeals transitional provisions for changes in judicial review that were needed as a result of the enactment of IIRIRA.[14]

Subtitle C – Fairness in Removal Proceedings

Sec. 121. Equitable Burden of Proof for Admissibility. – Changes the admission seeker's burden of proof in removal proceedings on the issue of admissibility from "clearly and beyond doubt" to "clear and convincing evidence."

Before IIRIRA, immigration officers did not have sole authority to exclude a foreign national from the United States. If the inspecting officer was not satisfied that the person seeking admission was "clearly and beyond doubt entitled to be admitted," he or she referred the person to an immigration judge for a full due process hearing on admissibility. The admission-seeker's burden of proof at the hearing was to establish to the satisfaction of the Attorney General that he or she was not inadmissible under any provision of the INA.[15] IIRIRA has specified that this requires the admission-seeker to establish his or her admissibility "clearly and beyond doubt,"[16] making the foreign nationals' burden of proof even higher than the burden of proof that the government has to meet in criminal proceedings. The "clear and convincing" evidence standard is more reasonable and

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[13]Section 301(b)(1) of IIRIRA.

[14]Section 309(c)(4) of IIRIRA

[15]Section 291 of the INA, 8 U.S.C. § 1361.

[16]Section 304 of IIRIRA.

is the same as the standard that the INS has to meet to establish that foreign national already in the United States should be deported.

Sec. 122. **Presumption in Favor of Withdrawal of Application for Admission.** – Creates a presumption in favor of granting a request for permission to withdraw an application for admission at any time to depart from the United States immediately, unless an immigration judge has rendered a decision on the admission seeker's admissibility. Permission may only be denied when denial is warranted by unusual circumstances. After an immigration judge has rendered a decision on admissibility, permission may still be given as a matter of discretion, but there would be no presumption in favor of granting the request.

The purpose of granting permission to withdraw an application for admission is to make it possible for the admission-seeker to avoid the consequences of a forced removal by leaving voluntarily. Among other things, under IIRIRA, a forced removal would bar the person from returning to the United States for at least five years.[17] A similar device is employed in cases where the person faces the possibility of deportation from the United States.[18] In that context, the privilege is called "voluntary departure." IIRIRA provided authority to grant requests for permission to withdraw an application for admission,[19] but it did not provide a presumption in favor of granting the requests.

Sec. 123. Absences Outside the Control of the Alien. – Under IIRIRA, a person with lawful permanent resident status is subject to a full inspection upon returning from a trip abroad if he has been absent from the United States for a continuous period of 180 days.[20] This section changes the time period from 180 days to a year (or longer if the absence is due to circumstances beyond the person's control).

IIRIRA has caused the detention of long-time permanent residents who temporarily leave the U.S. for business trips or vacations. Upon their return, they are detained and placed in removal proceedings for minor offenses that occurred long ago.

Sec. 124. Reinstatement of Removal Orders Against Persons Illegally Reentering. – Under IIRIRA, immigrants who reenter the United States after being previously removed must immediately be removed from the country without the foreign national having any opportunity for

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[17]Section 212(a)(9) of the INA, 8 U.S.C. § 1182(a)(9)

[18]Section 240B of the INA, 8 U.S.C. § 1229c.

[19]Section 302(a) of IIRIRA.

[20]Section 301 of IIRIRA.

review of the case by an Immigration Judge.[21] This provision addresses the harshness of IIRIRA by giving the individual an opportunity to have the previous removal order reviewed by an immigration judge prior to reinstatement of the removal order. In the course of such a review, the individual may seek any relief otherwise available under the INA.

Sec. 125. Removal Hearings Open to the Public. – Immigration hearings historically have been open to public as public hearings are generally viewed as critical to a fair hearing. Unfortunately, Immigration Judges have been closing hearings in ordinary immigration cases (i.e., visa overstays) based on a Department of Justice policy permitting closed hearings for persons suspected of terrorist activity. This provision codifies the basic requirement that hearings be held in the open.

Sec. 126. Deadline for Placement in Removal Proceedings. – For more than 15 years, the Code of Federal Regulations has required the Immigration and Naturalization Service to decide whether to file charges against an alien arrested without a warrant within 24 hours of their arrest. New regulations issued by the Justice Department seek to extend the amount of time a person may be detained by the INS without charges to 48 hours, or "in an emergency or other extraordinary circumstance…within an additional reasonable period of time." However, the new rule offers no definition of what is "an emergency or extraordinary circumstance", or a definition of what constitutes a "reasonable period of time." The rule is unlimited in its application, and can be applied to any non-citizen regardless of the circumstances surrounding their arrest. Under the recently passed USA PATRIOT Act, the Attorney General is required to bring charges against aliens certified as terrorist suspects within 7 days of their arrest. This section extends the long-standing 24 hour rule, but makes it clear that the Attorney General is required to bring charges against any detained alien within 48 hours of the alien's detention, unless the alien has been certified as an alien terrorist suspect under the USA PATRIOT Act.

Subtitle D – Fairness in Detention

Sec. 131. Restoring Discretionary Authority to the Attorney General in Cases of Individuals Who Pose No Risk to Safety or of Fleeing. – Restores pre-IIRIRA law granting the Attorney General discretionary authority to determine when its appropriate to detain immigrants in or after proceedings based on a criminal offense where the person does not pose a risk to persons or property and are likely to appear for future proceedings. Custody determinations would be subject to administrative and judicial review. Additionally, such individuals could challenge their detention by filing a writ of habeas corpus.

Sec. 132. Periodic Review of Detention Determinations. – Immigrants who face deportation after having completed their criminal sentence are often left languishing indefinitely in INS detention if their deportations cannot be effectuated. The frustration and anger that this causes was dramatically illustrated in an incident at a St. Martin Parish jail in St. Martinville, Louisiana,

[21]Section 305(a) of IIRIRA.

when a group of rebellious Cuban inmates held two sheriff's deputies and a jail warden hostage until arrangements were made to return them to Cuba. These inmates had been in custody since the completion of their sentences. Some of them had completed their sentences as far back as 1992.

Most of these individuals are from countries such as Cuba, Vietnam, and Cambodia, whose governments are not willing to accept them. IIRIRA granted the Attorney General the authority to release persons who are not deported within 90 days. INS policy requires the periodic review of long-term detention cases. This section establishes the mandatory review of such cases. Release determinations would be subject to administrative and judicial review. The provisions do not authorize the release of persons who pose a risk to the community or are unlikely to comply with their orders of removal.

Sec. 133. Limitation on Indefinite Detention. – Establishes a six month ceiling on the time an individual can be detained while waiting to be removed after he or she has completed his or her criminal sentence, so long as the individual is not certified as a terrorist. This section is premised on the principal that it is unfair to continue to punish individuals who have completed their criminal sentences and consistent with recent Supreme Court decisions.

Sec. 134. Pilot Program to Consider Alternatives to Detention. – Requires the Attorney General to establish a pilot program in three district offices to determine the viability of supervision of foreign nationals subject to detention under the INA through means other than confinement in a penal setting. It can be dangerous to house immigrant families in facilities which also house serious criminal offenders, and such detentions can become the equivalent of a prison sentence for people who have not committed a crime.

Sec. 135. Elimination of Mandatory Detention in Expedited Removal Proceedings. – Provides that foreign nationals detained during expedited removal proceedings may be released pending a decision on whether they should be removed from the United States. Release in such cases would be permitted on bond or on conditional parole.[22]

IIRIRA requires mandatory detention for all individuals involved in expedited proceedings.[23] Many of such persons are asylum seekers, and many asylum seekers are women and children. Notwithstanding the fact that such persons are not criminals and have done nothing wrong, under IIRIRA, they face the prospect of indefinite detention with criminals at a penal institution. This section recognizes that such individuals should be released unless they are flight risks, which would be determined on a case-by-case basis.

Sec. 136. Right to Counsel. – Currently an attorney who agrees to represent someone in a bond hearing at a remote detention center may end up being required by the immigration judge to

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[22]Section 236(a) of the INA, 8 U.S.C. § 1226(a).

[23]*Id.*

continue representing the person if he or she is not released from detention. This practice has resulted in a reluctance by some attorneys to accept detention cases because they cannot withdraw their appearance later. This section would allow attorneys, with the consent of their clients, to make limited appearances in bond, custody, detention, or removal immigration proceedings and thus ensure that persons have the privilege of being represented by counsel. The right to counsel would be at no expense to the government.

Sec. 137. Automatic Stays of Release Orders. – Under the law prior to October 31, 2001, any release order of an immigration judge could be stayed at any time by order of the Board of Immigration Appeals if the Board found cause to grant such an emergency stay.[24] Under certain narrow circumstances involving aliens subject to mandatory detention under INA § 236(c), the INS could obtain an automatic stay by filing a notice of intent to appeal the immigration judge's custody determination. On October 31, 2001, the Attorney General issued regulations that greatly expand the circumstances under which the INS may obtain an automatic stay of an order by an immigration judge's order to release an alien after a custody or bond hearing, by granting such a stay even where the alien was not subject to the mandatory detention rules of § 236(c).[25] In addition, the new regulations permit an automatic stay of an order of the Board authorizing release of an alien if the Service files a notice of intent to certify the case to the Attorney General. The effect of these regulations is to permit the Service to keep an alien in detention indefinitely, despite the orders of two adjudicatory bodies that the alien has demonstrated he is not a risk of flight, a danger to the community, or a risk to national security.

This section returns the law concerning stays of release orders by the Board of Immigration appeals to the regulation that was in place prior to October 31, 2001, by permitting an emergency stay at any time and by permitting a limited automatic stays of release orders to aliens detained under § 236(c) in order to give the Service time to request an emergency stay. It also codifies the standard for the Board to grant a stay of a release order, using the traditional four factor test. To obtain a stay, the Service must show (1) it is likely to succeed on the merits, (2) irreparable harm would occur if a stay is not granted, (3) the potential harm to the Service outweighs the harm to the alien, and (4) granting a stay would serve the public interest. Finally, section 137 provides additional stay authority to the Attorney General upon a finding that the alien is a threat to national security, in order to give the Attorney General time to determine whether to certify the alien as a suspected terrorist under new INA § 236A, added by § 412 of the USA PATRIOT Act.

Sec. 138. Report on Detention of Aliens. – Requires a report from the Department of Justice on detainees who have already received a final order of removal and persons detained on or after September 11, 2001 in connection with its anti-terrorism initiative. It also expresses a Sense of Congress that Congress is deeply concerned by the Attorney General's failure to meet reporting requirements mandated by law and expects that the reports be submitted to Congress within 90 days.

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[24] *See* 8 C.F.R. § 3.19(i) (2001).

[25] *See* 66 Fed. Reg. 54909 (Oct. 31, 2001), amending 8 C.F.R. § 3.19(i).

Sec. 139. Clarification of Intent of Transitional Provision on References to Removal Orders. – Sec. 309(d)(2) of IIRIRA was a transitional reference resulting from the creation of removal proceedings to replace exclusion and deportation proceedings. The transitional reference specifies that any reference to an order of removal shall be deemed to include a reference to an order of exclusion or an order of deportation. To make clear that Sec. 309(d)(2) of IIRIRA was solely intended to standardize the terms of art used within the INA and was not designed to support the retroactive application of any particular provision, this section clarifies that nothing in section 309(d)(2) of IIRIRA should be construed to apply retroactively to any of the changes made to the INA by IIRIRA.

Subtitle E – Consular Review of Visa Applications (Sections 141 – 142)

This subtitle incorporates the text of the "Consular Review Act of 2001" (H.R. 1345), which was introduced by Rep. Frank (D-MA) on April 3, 2001. It would require the Secretary of State to set up a Board of Visa Appeals that would have five members. The Board would have the authority to review any discretionary decision of a consular officer regarding the denial, cancellation, or revocation of an immigrant or nonimmigrant visa or petition, or the denial of an application for a waiver of any ground of inadmissibility under the INA. If the Board, finds that the consular officer's decision is contrary to the preponderance of the evidence, the Board could overrule or remand the case for further proceedings. The subtitle also provides that the Secretary of State would charge and collect a fee for review before the Board which will be sufficient to cover the administrative costs. In addition, language has been added to the Frank bill to provide that visas are not to be denied on a discriminatory basis within any individual country on account of race, religion, place of birth, gender, sexual orientation, or disability.

TITLE II – FAIRNESS IN CASES INVOLVING PREVIOUS AND MINOR MISCONDUCT

IIRIRA included a wide variety of changes which made it far easier to deport or exclude non-citizens for minor criminal violations which occurred many years ago. Among other things, IIRIRA lowered the sentence and monetary amount thresholds for many of the crimes on the list of aggravated felonies and other excludable or deportable offenses and did so on a retroactive basis -- meaning that offenses that were not previously deportable became deportable retroactively in 1996, even if they occurred in earlier years – and largely eliminated the Attorney General's discretion to make humanitarian exceptions to such deportation orders, even for long-time legal residents. IIRIRA also included harsh new five-year bars to admission for unintentional immigration offenses.

The changes made by IIRIRA have led to a wide variety of inequitable results. For example, in the spring of 1997, Jesus Collado, a 43-year-old legal resident and restaurant manager from the Dominican Republic was returning from a vacation to his homeland when he was arrested and imprisoned by immigration agents. He was charged with deportability under IIRIRA because twenty-three years earlier, when he was only19 years old, he had been convicted for having sex with his teenage girlfriend (IIRIRA made the offense "sexual abuse to a minor" an aggravated felony for

immigration purposes[26]). In another case, Rev. Frank Almonte, a well-known Hispanic television evangelist who has been a lawful permanent resident of the United States for more than 20 years, was imprisoned and charged with deportability because he had packed three jars of "appetite enhancer" pills into his son's suitcase on a recent trip home from the Dominican Republic. The pills, which are freely and legally available from pharmacists in the Dominican Republic, constituted a "controlled substance" of steroids in the U.S. -- a relatively low-level drug violation. Title II is intended to eliminate excesses of this nature and restore a greater semblance of equity and fairness into our immigration system.

Subtitle A – Increased Fairness and Equity Concerning Removal Proceedings

Sec. 201. Equitable Definition of Crime Involving "Moral Turpitude." – Eliminates exclusion from the United States under IIRIRA for acts of moral turpitude which may have constituted the elements of a crime but have not led to a conviction.[27] Limits the exclusion ground to cases in which the applicant has actually been convicted of the offense. This section also limits the applicability of the exclusion ground to offenses for which the person was sentenced to imprisonment for at least one year (as opposed to six months under IIRIRA).[28]

Sec. 202. Equitable Application and Definition of "Aggravated Felony" –

(a). Illicit Trafficking. – Excepts a single offense of simple possession of a controlled substance from the "aggravated felony" category created by IIRIRA[29] if it is the person's first controlled substance offense.

Under federal law, a simple first time possession offense is ordinarily not a felony and the maximum sentence for such offenses is less than a year. This subsection conforms immigration law to federal law by excepting a single offense of simple possession from being considered as an "aggravated felony."

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[26]Section 101(a)(43)(A) of the INA, 8 U.S.C. § 1101(a)(43)(A)

[27]Section 212(a)(2)(A) of the INA, 8 U.S.C. § 1182(a)(2)(A).

[28]This exclusion ground does not apply to a foreign national who committed only one crime if...(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed...) did not exceed imprisonment for one year... Section 212(a)(2)(A)(ii)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

[29]Section 101(a)(43)(B) of the INA, 8 U.S.C. § 1101 (a)(43)(B)

(b). Crimes of Violence and Theft Offenses. – Changes the definition of violence and theft offenses that are considered to be "aggravated felonies[30]" under IIRIRA from offenses for which the sentence was imprisonment for at least one year to offenses for which the sentence was imprisonment for at least five years.

Before IIRIRA, crimes of violence and theft offenses were not considered to be aggravated felonies unless they were subject to a five-year term of imprisonment. IIRIRA reduced this to a one-year term of imprisonment.[31]

(c). Alien Smuggling – Limits the "alien smuggling" category in the definition of an "aggravated felony" to offenses committed for the purpose of commercial gain.[32]

Although IIRIRA provided that a first offense of alien smuggling is not an aggravated felony if it was carried out to assist the smuggler's spouse, child, or parent,[33] it still subjects non-citizen repeat offenders to permanent removal for helping a spouse, child, or parent to illegally enter the United States. This simply is too harsh for such an offense; a mother should not be deported and barred forever from returning because she tried to reunite with her child. This subsection reflects the view that permanent removal from the United States is only appropriate in cases involving professional smugglers.

(d). Discretionary Waiver in Cases of Other Minor Felonies. – Grants discretionary authority to the Attorney General to disregard, for immigration purposes, convictions for aggravated felonies that did not result in incarceration for more than one year. This section makes relief available in cases where the person facing permanent removal from the United States committed a relatively minor offense.

(e). Conforming Change Concerning Removal of Nonpermanent Residents. – Repeals a provision that bars nonpermanent resident aliens who have been convicted of an aggravated felony from being eligible for discretionary relief from removal.

This bar, which was created by IIRIRA,[34] is superfluous under current immigration law. Under the INA as presently written, people who have aggravated felony convictions in their records are virtually ineligible for any form of relief from removal in any event, so the bar has no operative

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[30]Section 101(a)(43)(F) and (G) of the INA, 8 U.S.C. § 1101(a)(43)(F) and (G).

[31]Section 321(a)(3) of IIRIRA.

[32]Section 101(a)(43)(N) of the INA, 8 U.S.C. § 1101(a)(43)(N)

[33]Section 321(a)(8) of IIRIRA.

[34]Section 238(b)(5) of the INA, 8 U.S.C. § 1227(b)(5).

effect. The bar presents a problem, however, with respect to the provisions included in this title which provide relief for people whose aggravated felony convictions that were based on relatively minor offenses.

Sec. 203. Equitable Definition of "Conviction" and "Term of Imprisonment." – Modifies IIRIRA's definition of "conviction" to provide that an adjudication or judgment of guilt that has been expunged, deferred, annulled, invalidated, withheld, or vacated; an order of probation without entry of judgment; or any similar disposition will not be considered a conviction for purposes of the INA. This section also strikes the provision in that definition which states that any reference to a "term of imprisonment" or "sentence" is deemed to include the period of incarceration or confinement ordered by the court regardless of any suspension of the imposition or execution of the imprisonment or sentence.

Under IIRIRA's definition of a "conviction," it does not matter whether an adjudication of guilt has been withheld.[35] This means that a person can suffer the immigration consequences of a felony conviction even in situations where the criminal court judge tried to give the person a break. IIRIRA also specified that any reference to a "term of imprisonment" or "sentence" is deemed to include the period of incarceration or confinement ordered by the court regardless of any suspension of the imposition or execution of the imprisonment or sentence.[36]

Sec. 204. Equitable Definition of Crimes of "Moral Turpitude." – Limits deportation for conviction of a crime involving moral turpitude to cases where the conviction resulted in the foreign national's incarceration for a period exceeding one year.

IIRIRA provided for deportation when a foreign national is convicted of a crime involving moral turpitude for which a sentence of one year or longer may be imposed.[37] This makes it possible to deport someone who has committed a relatively minor offense. This section limits deportation on this basis to cases where the offense was serious enough to result in incarceration for a year or more.

Sec. 205. Restoration of Fairness in Equitable Relief for Long-Time Legal Permanent Residents (formerly known as section 212(c) relief) – Restores discretion to immigration judges to grant relief from removal to long-time legal permanent residents who have committed minor criminal offenses. Also, repeals IIRIRA's stop-time rule so that lawful permanent residents can continue to accumulate residency time for purposes of the seven-year eligibility requirement so long as they maintain their permanent resident status in the U.S.

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[35]Section 322(a)(1) of IIRIRA.

[36]*Id.*

[37]Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i).

IIRIRA[38] deleted former section 212(c) of the INA, which permitted lawful permanent residents to seek discretionary relief from exclusion and deportation, so long as they had maintained their domicile in the U.S. for at least seven consecutive years, and substituted a far narrower form of discretionary relief known as "cancellation of removal."[39] Of particular concern, IIRIRA included a "stop-time" provision terminating the accrual of time for purposes of the seven-year residency requirement before the issuance of a decision to terminate the person's lawful permanent resident status.[40] IIRIRA also eliminated the discretion to consider relief on a case-by-case basis for persons who have been convicted of minor crimes that are classified as "aggravated felonies." The combined effect of these changes was to greatly reduce the number of deserving long-time lawful permanent residents who can be considered for this type of discretionary relief.

This section retains the concept of cancellation of removal relief enacted under IIRIRA, but restores some modicum of equity and fairness to it. First, the section repeals IIRIRA's stop-time rule so that lawful permanent residents may continue to accumulate residency time for purposes of the seven-year eligibility requirement so long as they maintain their permanent resident status. This is far more equitable than cutting off the accumulation of residency time at an arbitrary point that is prior to a decision regarding whether the applicant may maintain his or her residency. Second, this section would permit immigrants classified as aggravated felons to be eligible for discretionary relief, but only if they did not receive a sentence of five years or more. This insures that dangerous offenders will be removed, while permitting individual circumstances to be considered in less serious cases.

Sec. 206. Restoration of Fairness in Equitable Relief for Other Non-Citizens (formerly known as suspension of deportation). – The previous section enhanced the availability of equitable and discretionary relief for long-term permanent residents. This section would enhance the availability of equitable and discretionary relief to other immigrants by restoring the forms of equitable relief available more generally under pre-IIRIRA law.

Prior to IIRIRA, in addition to the discretionary relief from removal under section 212(c) for long time legal permanent residents, a more stringent two-tier form of relief from removal known as "suspension of deportation" was available to all immigrants by application to an immigration judge in deportation proceedings.[41] The first form of such relief required seven years of continuous physical

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[38]Section 304(b) of IIRIRA.

[39]Section 240A(a) of the INA, 8 U.S.C. § 1229b(a).

[40]Under IIRIRA, the accrual of such time would stop at the time of the alleged offense or date of notice to appear for removal proceedings. Section 240A(d)(1) of the INA, 8 U.S.C. § 1229b(d)(1).

[41]A third type provided relief for battered spouses. Section 244(a)(3) of the INA, 8 U.S.C. § 1254(a)(3). The requirements for this type of suspension have been retained in nearly the same

presence and good moral character, and proof that deportation would result in extreme hardship to the immigrant or to his or her U.S. citizen or lawful permanent resident spouse, child, or parent. If the immigrant was subject to deportation for more serious grounds (such as for certain criminal offenses, for security grounds, for failure to register, or for falsification of documents), suspension of deportation relief required 10 years of continuous physical presence and good moral character, and proof that deportation would result in exceptional and extremely unusual hardship to the immigrant or to his or her U.S. citizen or lawful permanent resident spouse, child, or parent.

IIRIRA replaced this suspension of deportation regime with a single form of "cancellation of removal" relief which significantly narrowed eligibility for equitable relief. First, if an immigrant is subject to the more serious type of removal grounds, IIRIRA completely disqualified him or her, no matter how compelling his or her individual circumstances or the magnitude of harm to his or her family. Second, with respect to other immigrants not subject to removal for such serious grounds, IIRIRA requires them to establish 10 years of continuous physical presence and good moral character, and prove that deportation would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, child, or parent, eliminating consideration of hardship to the foreign national himself or herself. Third, IIRIRA placed an arbitrary annual cap of 4000 on the number of people who can receive cancellation of removal.

The changes made by IIRIRA with regard to suspension of deportation relief have made discretionary relief unavailable to many immigrants even though they and their families will suffer terrible hardships upon deportation. Restoration of the previous system will make it possible to grant relief to deserving immigrants on a case-by-case basis when it is warranted. This will give immigrants and their families a second chance and will benefit their families and our country.

Sec. 207. Eliminating Unfair Retroactive Changes in Removal Rules for Persons Subject to Pending Proceedings. – The changes outlined above repeal the specific changes made by IIRIRA which unfairly subjected immigrants to deportation on a prospective basis. In addition, this section ensures that immigrants currently subject to removal proceedings will not suffer from unfair retroactive changes in the law. Thus, an immigrant will not be found to be removable for committing any offense that was not a ground for removal or deportation when the offense occurred (e.g., the "aggravated felony" classification will apply only to an offense that was defined as an "aggravated felony" when the offense occurred).

Sec. 208. Eliminating Unfair Retroactive Changes in Removal Rules for Persons Previously Removed. – Permits certain former LPRs who have been unfairly removed from the U.S. to return and apply for relief under section 212(c) relief as it existed prior to IIRIRA or for cancellation of removal under the provisions of this bill. Applies to lawful permanent residents who were (1) removed for a criminal offense that was not a basis for removal when it was committed; (2)

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form in the new provision for cancellation of removal for battered spouses. Section 240A(b)(2) of the INA, 8 U.S.C. § 1229b(b)(2).

removed for a criminal offense that is not a basis for removal on the date this bill is enacted; or (3) removed for a criminal offense for which relief would have been available but for the enactment of AEDPA or IIRIRA. For persons who currently are outside the country, an applicant must make a showing of prima facie eligibility for relief to the Attorney General prior to entering the United States.

Just as previous sections restored equity to immigrants subject to deportation prospectively and currently subject to removal, this section helps to provide some fairness to persons already removed (or to be removed prospectively) as a result of changes instituted by IIRIRA, which made minor offenses grounds for deportation. The section does this by granting the Attorney General authority to admit previously removed former legal permanent residents (as well as persons removed on a prospective basis under IIRIRA's arbitrary standards) so they may seek discretionary relief from exclusion, removal or deportation. In applying to enter the country and at the hearing on the merits of the application, the former LPR would have the burden of establishing eligibility and that relief is warranted as a matter of discretion.

For instance, Jesus Collado, a 43-year-old legal resident and restaurant manager from the Dominican Republic was returning from a vacation to his homeland when he was arrested and imprisoned by immigration officers. Twenty-three years earlier, when he was only 19 years old, he had been convicted for having sex with a minor -- his then 15 year old girlfriend -- and sentenced to probation. At the time, this conduct did not carry with it any adverse immigration consequences, but in 1996, IIRIRA recharacterized such actions as constituting an "aggravated felony," which made him deportable from the United States and ineligible for any form of relief.[42]

Subtitle B – Increased Fairness and Equity Concerning Five-Year Bars to Admission and Other Grounds for Exclusion

Sec. 211. Limiting Five-Year Bar to Admission to Persons Who Willfully Fail to Attend Removal Proceedings. – Limits the applicability of the five-year bar to admissibility that IIRIRA imposed on persons who fail to attend or remain in attendance at removal proceedings to situations where the individual acted willfully.[43] The five-year bar to admissibility mandated by IIRIRA is unnecessarily harsh for cases in which the person has not acted willfully. Such consequences are not warranted in the absence of an element of fault or blameworthiness.

Sec. 212. Limiting Five-Year Bar to Admission to Persons Who Willfully Violate Student Visa Conditions. – Limits the applicability of the five-year bar to admissibility that IIRIRA imposed on persons who violate a term or condition of their nonimmigrant student visas to situations

[42]Anthony Lewis, *Punishing the Past*, N.Y. Times, March 30, 1998, at A17.

[43]Section 301(c) of IIRIRA.

where the student acted willfully.[44] Again, a five-year bar to admissibility is unnecessarily harsh in such situations unless there is an element of fault or blameworthiness.

Sec. 213. Limiting Ban on Admissibility to Persons Who Falsely and Willfully Make Claims to Citizenship. – Limits the applicability of an IIRIRA provision which made making a false claim to citizenship for an immigration benefit a basis for exclusion or deportation.[45] Under this section, the INS would be required to prove that a claim of citizenship was not only false, but was also in fact willfully made by the individual. This again is an attempt to limit harsh consequences to situations in which there is an element of fault or blameworthiness.

Sec. 214. Equitable Waiver of Inadmissibility for Minor Criminal Offenses. – Authorizes granting a waiver of inadmissibility based on a controlled substance violation for which the foreign national was not incarcerated for a period exceeding one year, thereby overriding IIRIRA's threat of exclusion for minor infractions (e.g., possessing very small amounts of marijuana).[46] Also strikes a provision added by IIRIRA which made some lawful permanent residents ineligible for such waivers of inadmissability.

The proposed one year of incarceration standard provides a more reasonable cut-off point for distinguishing between serious and relatively minor offenses. In cases where someone committed a serious offense but was incarcerated for less than a year, the adjudicator could still deny relief as a matter of discretion.

The other change is necessary to overturn provisions in IIRIRA that discriminates against immigrants who have become lawful permanent residents of the United States. These provisions require lawful permanent residents to satisfy requirements that do not have to be met by persons who have not become lawful permanent residents. For instance, a foreign national who has become a lawful permanent resident is not eligible for relief unless he or she has lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the foreign national from the United States.[47]

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[44]Section 346 of IIRIRA.

[45]Section 344 of IIRIRA.

[46]Section 212(h) of the INA, 8 U.S.C. § 1182(h).

[47]Section 348(a) of IIRIRA provides: "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States."

Sec. 215. Eliminating the 3 and 10 Year Bars to Admissibility. – IIRIRA created a new bar to admissibility for foreign nationals who are unlawfully present in the United States for certain periods of time.[48] A person unlawfully present in the United States for more than 180 days but less than 1 year who then voluntarily departs from the United States is barred from reentering the United States for 3 years. A person who is unlawfully present in the United States for 1 year or more and then voluntarily departs is barred from reentering the United States for 10 years. These bars to admissibility are unduly harsh as persons can be unlawfully present for minor reasons such as unintentionally overstaying their authorized period of stay. Moreover, these bars often result in separation of family members. For example, a person who leaves the country rather than remain in the U.S. contrary to law will be unable to live with family members, such as U.S. citizen children, who lawfully remain within the United States. To remedy the harshness of IIRIRA, this section eliminates the 3 and 10 year bars to admissibility.

TITLE III – ENCOURAGING FAMILY REUNIFICATION

Subtitle A – Reuniting Family Members

Sec. 301. Visa for Spouses and Children of Permanent Residents Temporarily Waiting for Visa Numbers. – This provision removes the requirement that family members seeking to join their lawful permanent resident spouse or parent in the United States must have a family petition pending for three-years in order to be eligible for the "V" visa. It also extends the "V" visa to persons waiting for an immigrant visa number on the basis of their status as battered immigrants.

The INA has a system for determining the order in which foreign nationals will receive the limited number of immigrant visas that are available each year. Although spouses and children of permanent resident aliens can obtain a preference classification which accords them priority in this system, they may have to wait years before they actually receive a visa and can rejoin their family. The "V" seeks to allow those family to be re-unified, but requires that the petition be pending for at least three years before they are eligible to enter the U.S.

Battered immigrants often need protection from the relative who initially petitioned for them. The proposed reforms to the "V" visa will permit such persons to seek the protection of United States law while they are waiting for visa numbers. In a typical case, this will make it possible for a woman to be with her children in the United States instead of being forced to take them to another country or leave them with an abusive father in the United States.

Sec. 302. Refugee Status for Unmarried Sons and Daughters of Refugees. – Authorizes granting refugee status to unmarried sons and daughters who are accompanying or following to join a parent who is a refugee when such a benefit is warranted by unusual circumstances or to preserve family unity.

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[48] Section 301(b)(1) of IIRIRA.

Under current law, this privilege is accorded only to the spouse or "child" of a refugee, defined as a person under the age of 21. When children reach the age of 21, they are classified as "sons and daughters" and lose their entitlement to refugee status. Ordinarily, a child no longer needs to live with parents after the age of 21, but this is not always the case. For instance, some children are mentally retarded or autistic and continue to need their parents after reaching that age. This section will address that need.

Sec. 303. Asylee Status for Unmarried Sons and Daughters of Asylees. – Authorizes granting asylee status to unmarried sons and daughters who are accompanying or following to join a parent who is a refugee when such a benefit is warranted by unusual circumstances.

This is the same as the relief for refugees described above. "Refugee" status and "asylee" status are similar for most purposes. In both cases, refuge is being given to a person who is fleeing from persecution.[49] The main difference between these forms of relief is that "refugee" status is given at a consulate office in another country to a person who has not reached the United States yet, and "asylee" status is given to someone who is already in or at the border of the United States. Consequently, the justification for authorizing discretion in the case of the sons and daughters of refugee parents applies equally to the sons and daughters of asylee parents.

Sec. 304. Protection Against Processing Delays. – Provides protection against INS and State Department delays in processing visa applications for certain time sensitive applicants, such as for minor children, by requiring the determination of an applicant's eligibility to be based on the beneficiary's qualifications 90 days after the date on which the application for a visa or for adjustment of status is filed. For instance, where a beneficiary of a visa petition for immediate relative status is under the age of 21 or has a qualifying familial relationship when the adjustment of status or visa application is filed, the beneficiary will continue to be considered a child even if he or she is older than 21 at the time of adjudication or will retain the qualifying familial relationship even if it does not continue at the time of adjudication, if the INS or State Department takes more than 90 days to complete its adjudication of the adjustment of status or visa application.

This section also incorporates text of H.R. 133, legislation introduced by Rep. Mink (D-HI) on January 3, 2001. This assures that immigrants do not have to wait longer for an immigrant visa as a result of a reclassification because of the naturalization of a parent or spouse.

Subtitle B – Limited Waiver of Grounds of Admissibility

Sections 311 – 313. Prior to IIRIRA, specified categories of immediate relatives (e.g., spouses, children, and parents) who were found to be inadmissable to the U.S. were permitted to apply to the Attorney General for a discretionary waiver of inadmissability on a case-by-case basis. IIRIRA limited eligibility for such waivers by, among other things, narrowing the category of eligible relatives to exclude parents; by requiring a showing that the refusal to admit the applicant would

[49]In fact, a person seeking asylum must establish that he meets the definition of a "refugee."

result in "extreme hardship" to his or her citizen or LPR relative in the U.S.; and by narrowing the grounds for eligible humanitarian relief. Collectively, these changes are not only illogical and inconsistent with the type of discretionary relief available in deportation cases, but they have made it far more difficult for families to reunite so they could support themselves emotionally and financially. The changes outlined in this Subtitle serve to overturn the most severe and anti-family aspects of the changes to the waiver of inadmissability law made by IIRIRA.

Sec. 311. Discretionary Waiver in Cases involving Family Members. – Restores waiver eligibility to the parents of a lawful permanent resident or citizen son or daughter. Permits the waiver in cases where the applicant is able to establish that "hardship" would result from refusal of admission, rather than having to meet the higher standard imposed by IIRIRA of showing "extreme hardship.[50]" Makes the waiver available to eligible relatives who are inadmissible on the ground that they are present in the United States without having been formally admitted or paroled into the country.

IIRIRA made parents of U.S. citizens or lawful permanent residents ineligible for this waiver. In addition, IIRIRA for the first time added a hardship requirement, by requiring the applicant to establish that the waiver is needed to avoid causing "extreme hardship" to his or her spouse or parent.[51] Although this section retains a general hardship requirement, it would not require a showing of "extreme" hardship. Finally, IIRIRA made persons present in the United States without being admitted or paroled inadmissable, and this section provides a discretionary waiver of that new ground of inadmissability.

Sec. 312. Discretionary Waiver in Document Cases Involving Family Members. – Current law provides a waiver of inadmissibility or deportability based on a conviction for a document fraud if the offense was committed solely to assist, aid or support the foreign national's "spouse or child" and not any other individual. This subsection adds "parent" and non-minor children to this list of relatives.

Under IIRIRA, this waiver is limited to spouses and children.[52] The reasons for permitting relief in cases where the foreign national was acting solely to help a spouse or a child apply with equal force to the case in which the foreign national was trying to help a parent or non-minor son or daughter. Relief obviously should be available in both situations.

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[50]Section 349 of IIRIRA.

[51]Section 212(i) of the INA, 8 U.S.C. § 1182(i). This change was made by IIRIRA even though the counterpart for this waiver in the context of deportation grounds did not have such a requirement. Section 237(a)(1)(H) of the INA, 8 U.S.C. § 1227(a)(1)(H).

[52]Section 345 of IIRIRA.

Sec. 313. Discretionary Waiver to Admit Persons in Unusual Circumstances. – Creates a new waiver which provides authority to admit otherwise excludable applicants in unusual circumstances (including victims of a battering or extreme cruelty by a spouse or other relative) for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

This waiver provides discretion in a variety of situations in which the admission-seeker has inadvertently committed a minor or technical immigration violation. For example, it would apply to cases in which the applicant would be inadmissible or ineligible for adjustment of status because of a failure to attend removal proceedings,[53] for unintentionally violating the conditions of a student visa,[54] for having been removed previously,[55] and for being unlawfully present in the United States.[56]

Subtitle C – Eliminating Unfairness and Waste in Section 245(i) Waivers

Sec. 321. Permanent Application of Section 245(i). – Makes section 245(i) of the INA[57] a permanent provision and creates special immigration accounts for the fees this provision will generate.

Before the section 245(i) waiver was enacted, an foreign national in the United States who wanted to become a lawful permanent resident through adjustment of status had to be present in this country lawfully. Without lawful presence, he or she had to leave the United States, apply for an immigrant visa at a consulate office abroad, return to the United States, and then apply for admission as a lawful permanent resident at a border or port of entry. The 245(i) waiver created an exception to this burdensome obstacle for foreign nationals who had become eligible for permanent resident status on the basis of a family relationship or job skills, permitting such a person to become a lawful permanent resident without having to leave the country. Unfortunately, it was not enacted as a permanent provision and initially had an October 1, 1997, sunset date. A limited continuation was authorized in the 1998 Justice, State, Commerce Appropriations bill, but the authorization only applies to foreign nationals who are the beneficiaries of (1) a petition for a family-based or an employment-based immigration preference which was filed on or before January 14, 1998, or (2) an application for labor certification which was filed on or before January 14, 1998. This section will eliminate these restrictions and make section 245(i) permanent.

Subtitle D – Equitable Procedures Concerning Voluntary Departure

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[53]Section 212(a)(6)(B) of the INA, 8 U.S.C. § 1182(a)(6)(B).

[54]Section 212(a)(6)(G) of the INA, 8 U.S.C. § 1182(a)(6)(G).

[55]Section 212(a)(9)(A)(I) and (ii) of the INA, 8 U.S.C. § 1182(a)(9)(A)(I) and (ii).

[56]Section 212(a)(9)(B)(I) of the INA, 8 U.S.C. § 1182(a)(9)(B)(I).

[57]Section 1255(i) of the INA, 8 U.S.C. § 1255(i).

Sec. 331. Discretionary Determination of Period of Voluntary Departure. – Permits grants of voluntary departure for the period of time that is warranted by the foreign national's circumstances.

A person facing the prospect of forced removal may be permitted to leave the United States voluntarily before being put in removal proceedings or prior to the completion of such proceedings.[58] Voluntary departure avoids the consequences of a forced departure, such as a five-year ban on readmission. IIRIRA specified that the foreign national must be required to leave the United States within a 120-day period.[59] The point of this restriction is not apparent. In many cases, the foreign national will not need 120 days to prepare for departure from the United States. In some cases, the foreign national will need more than 120 days. This section simply returns the discretion to make the determination on the basis of the circumstances in a particular case.

Sec. 332. Discretionary Determination of Voluntary Departure Bond Based on Individual Circumstances. – Eliminates the mandatory requirement that a foreign national must post a bond as a condition for receiving voluntary departure at the conclusion of removal proceedings and instead leaves this matter up to the discretion of the official who sets the bond terms.

The mandatory bond requirement was created by IIRIRA.[60] It is yet another example of unnecessary rigidity. In fact, some times a bond is appropriate, and some times a bond is not appropriate. It depends on the circumstances and so should the decision on whether to impose one.

Sec. 333. Elimination of Automatic Penalties for Failing to Depart in Accordance With a Voluntary Departure Grant. – Eliminates penalties for failing to depart pursuant to a grant of voluntary departure.

Under IIRIRA, such a failure can result in being ineligible for specified forms of discretionary relief for 10 years and subject the person to civil penalties of between $1,000 and $5,000.[61] This is harsh and unnecessary. Under this section, failure to depart in accordance with a grant of voluntary departure would be an adverse factor in any application for discretionary relief, but the circumstances of the case would determine whether this or any other adverse factor justifies denial of relief.

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[58]Section 240B of the INA, 8 U.S.C. § 1229c. An Immigration Judge may also afford a person voluntary departure when adjudicating a removal proceeding.

[59]Section 304(a) of IIRIRA.

[60]*Id.*

[61]*Id.*

Subtitle E -- Fairness in Public Charge Determinations

Sec. 341. Equitable Procedures Concerning Public Charge and Affidavit of Support. – Eliminates the requirement of an affidavit of support as a condition for admissibility,[62] but it permits using such an affidavit as evidence that the applicant for admission should not be excluded as a person who is likely to become a public charge.[63] Also reduces the minimum income requirement for persons who sponsor the immigrants from 125% of the Federal poverty line to 100%.

IIRIRA required family-sponsored immigrants and certain employment-based immigrants to have an affidavit of support as a condition of admission to the United States.[64] This and the minimum income requirement frequently prevent family reunification and constitute nothing less than "class warfare" by telling the world that immigration is only for the wealthy and their relatives. These requirements are unnecessary because an immigrant is inadmissable in any event in the absence of proof that he or she is a person who is not likely to become a public charge.

TITLE IV – FAIRNESS IN ASYLUM AND REFUGEE PROCEEDINGS

Subtitle A – Increased Fairness in Asylum Proceedings

Sec. 401. Elimination of Arbitrary Time Limits on Asylum Applications. – Eliminates the requirement that an asylum applicant must establish that his application was filed within one year of his arrival at the United States or justify the delay on the basis of extraordinary circumstances.[65]

The artificial time limit created by IIRIRA has resulted in a complex layer of adjudications over whether delays are justified by extraordinary circumstances and thus diverts resources from

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[62]Section 212(a)(4)(C) and (D) of the INA, 8 U.S.C. § 1182(a)(4)(C) and (D).

[63]Section 212(a)(4)(A) of the INA, 8 U.S.C. § 1182(a)(4)(A).

[64]Section 531 of IIRIRA.

[65]Section 604(a) of IIRIRA.

resolving the merits of asylum applications. It also increases the number of applications which have not been carefully prepared, as asylum seekers are forced to submit by the deadline or be categorically denied. Moreover, it arguably violates some United States international obligations such as Article 33 of the 1967 Protocol regarding the Status of Refugees. Article 33 binds signatories to the duty of not returning any refugee who could face a threat to his or her life or liberty in the country of feared persecution, without regard to when the person makes known the claim to need such protection. Ironically, when IIRIRA took effect, the INS had already taken substantial strides to increase efficiency and cut down on fraud in asylum applications through the use of more asylum officers and immigration judge corps. Given the political and economic instability in almost every region of the world, it is imperative that the United States maintain its status as a refuge against persecution, and not impose any random deadlines on asylum applications.

Sec. 402. Asylum in Cases of Gender-based Persecution. – Adds a provision to the definition of a "refugee" which specifies that persecution on account of gender will be deemed to fall within the "particular social group" category for asylum purposes.

Under current law, an applicant for asylum must satisfy the technical requirements for establishing that he or she is a "refugee,[66]" which include proof that the alleged persecution was or would be "on account of race, religion, nationality, membership in a particular social group, or political opinion.[67]" Asylum applicants have found it extremely difficult to show that gender-based persecution claims fall within one of these categories. This is illustrated by the case of Alvarado Pena, a Guatemalan woman. Although Ms. Pena established that she had been raped and pistol-whipped by her husband, she was not able to prevail with her argument that her husband's abuse was on account of her membership in a particular social group consisting of women or, alternatively, Guatemalan women living under male domination. This problem will be eliminated by the subsection's provision that persecution on account of gender will be deemed to fall within the "particular social group" category.

Sec. 403. Presumption of Asylum in Cases of Past Persecution. – Creates a presumption that a person who was persecuted in the past has a well-founded fear of being persecuted in the future unless the conditions in his or her country have changed. Also provides that the person may still be considered a refugee even where the presumption has been rebutted if the past persecution was sufficiently severe.

It can be very difficult for a person who has left a country after being persecuted to establish that he or she will be persecuted again if he or she returns to the country. The INS is in a much better position to obtain information on how country conditions have changed than is the asylum applicant. Under this section, the burden would be on the INS to rebut the presumption. In some situations, relief should be granted even when the INS has rebutted the presumption. In cases of

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[66]Section 208(b)(1) of the INA, 8 U.S.C. § 1158(b)(1).

[67]Section 101(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42)(A).

severe persecution, it may be unconscionable to make the asylee return even if he or she is unlikely to be persecuted again.

Sec. 404. Rebuttable Presumption of Asylum Where Persecution Occurs with Respect to a Particular Location in a Country. – Presumes that a person who has established a persecution claim with respect to a particular location in a country has a well-founded fear of future persecution with respect to all locations in that country, unless this presumption is rebutted by evidence that the threat is not country-wide. Provides further that the person can still be considered a refugee when this presumption has been rebutted if it would be unreasonable to expect resettlement to another location.

The presumption is needed because, just as it can be very difficult to prove past persecution, it can also be very difficult for a person to obtain evidence to show country-wide persecution. The provision with respect to resettlement takes into account the fact that it is frequently unreasonable to expect a person to move to another part of his or her country. For example, it would not be reasonable to expect a person who requires special medical attention that is available only in large metropolitan areas to relocate to a rural community.

Sec. 405. Elimination of Arbitrary Cap on Persons Eligible to Adjust Status From Asylees to Legal Permanent Residents. – Eliminates the cap of 10,000 on the number of individuals who can change their status from "asylee" to "lawful permanent resident" in any fiscal year.[68]

Sec. 406. Restoration of Eligibility for Withholding of Removal for Persons Facing Loss of Life or Freedom. – Amends the provision that withholds removal for certain individuals facing the possibility of being removed to a country where their life or freedom would be in danger. Individuals who have been convicted of certain offenses are currently ineligible for withholding even if they face severe danger upon removal. This section would limit that exclusion to individuals who were sentenced to an aggregate term of imprisonment of more than five years and are considered to be a danger to the United States.

[68]Section 209(b) of the INA, 8 U.S.C. § 1159(b).

Subtitle B – Increased Fairness and Rationality in Refugee Consultations

Sec. 411. Timely Consultation With Respect to Refugee Admissions. – Changes the time for the President's report on refugee admissions from the beginning of each fiscal year[69] to the date when he or she submits his or her budget proposal to Congress.

Under the present system, Congress receives a report from the President regarding the proposed number of refugees to be admitted into the United States in the next fiscal year. Congress often does not obtain access to the refugee report until it is too late to meaningfully evaluate the number of refugee admissions in the framework of the money available for the fiscal year. By the time the report is made, the funds for the fiscal year have already been allocated, including whatever funds are needed for refugee admissions.

TITLE V – MISCELLANEOUS PROVISIONS

Sec. 501. Limiting Forfeiture for Certain Assets Used to Violate INA Where There Was No Commercial Gain. – Limits the seizure and forfeiture of a vehicle used to harbor or smuggle a foreign national to cases in which the purpose of harboring or smuggling the foreign national was commercial advantage or private financial gain.

With a few exceptions, INA provides that any vehicle used to harbor or smuggle an foreign national is subject to seizure and forfeiture.[70] This section limits seizure and forfeiture to cases where it is being done by professional smugglers.

Sec. 502. Elimination of Ban on State and Local Governments from Preventing Communications with the INS. – Repeals a provision in IIRIRA[71] which prohibits any federal, state or local government official from preventing or restricting any government entity from sending to or receiving information from INS regarding the citizenship status or immigration status of any individual, or maintaining such information.

This subsection restores the right of state and local government entities to decide the extent to which they will participate in the enforcement of immigration laws. For instance, a local government might want to provide charitable benefits to immigrant children without fear of

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[69]Section 207(d) of the INA, 8 U.S.C. § 1157(d).

[70]Section 274(b) of the INA, 8 U.S.C. § 1324(b).

[71]Section 642 of IIRIRA.

information being released about which immigrants receive the benefits, which could discourage the immigrant community from taking the benefits. Under IIRIRA, the local government is prohibited from keeping such records confidential from INS.

Sec. 503. Elimination of Authority to Permit State Personnel to Carry Out Immigration Officer Functions. – This provision repeals section 287(g) of the INA[72] which allows the Attorney General to enter into agreements with State and local governments to have enumerated immigration functions handled by local law enforcement agencies. Cities, such as New York City, Salt Lake City and Miami, have objected to being engaged in functions that are beyond their general scope and experience. Moreover, the rights of citizens and foreign nationals are better protected by those with the requisite knowledge and understanding of the immigration laws.

Sec. 504. Parole Authority – Deletes the present standard for determining when to parole a person into the United States temporarily, which is, "for urgent humanitarian reasons or significant public benefit, "[73] and substitutes in its place, "for emergent reasons or for reasons deemed strictly in the public interest."

The present standard does not provide sufficient discretion for responding to an unexpected or urgent need to enter the United States in cases where the person involved has not been able to establish his or her admissibility. For instance, a person with a technically deficient entry document might suddenly develop a dental problem that requires attention but is not serious enough to be considered an urgent humanitarian reason for parole or a matter of significant public benefit. This section would permit but not require parole in such a situation.

Sec. 505. Enhanced Border Patrol Recruitment and Retention. – Incorporates the text of the "Border Patrol Recruitment and Retention Act of 1999" (H.R. 1881), which was introduced by Rep. Jackson Lee (D-TX) on May 20, 1999. It provides for an increase to the GS-11 grade level for Border Patrol agents who have completed one year of services at a GS-09 grade level and who have fully successful performance rating. It also directs the INS Commissioner to establish an Office of Border Patrol Recruitment and Retention to (1) develop outreach programs to identify and recruit prospective Border Patrol agents; (2) develop programs to retain such agents; and (3) submit recommendations to the Commissioner relating to such agents' pay and benefits.

Sec. 506. Elimination of Denial of Immigration Benefits for Erroneous Asylum Application. – Eliminates two IIRIRA provisions limiting the rights of persons seeking asylum. Section 208(d)(6) of the INA implemented by section 604 of IIRIRA prohibited foreign nationals who have knowingly made a "frivolous" asylum application from ever receiving any benefit under the INA. Similarly, section 208(d)(7) of the INA implemented pursuant to section 604 of IIRIRA stated

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[72]Section 133 of IIRIRA.

[73]Section 212(d)(5)(A) of the INA, 8 U.S.C. § 1182(d)(5)(A).

that nothing in the asylum provisions of the INA can be construed to create a legally enforceable substantive or procedural right or benefit.[74]

Sec. 507. Authorization of Appropriations for Implementation of Act. – Authorizes appropriations for the various provisions included in the Act.

TITLE VI – EFFECTIVE DATES -- Sets forth various effective dates with regard to the Act's provisions.

[74]The provisions that are being eliminated illustrate the extreme rigidity and harshness of IIRIRA. Under the former provision, rights entitled to asylum seekers under the INA's asylum provisions, including the rights and processing requirements in INA section 208, can no longer be enforced by the foreign national. Under the latter provision, an asylum applicant who makes a good faith persecution claim that is deemed to be frivolous may be declared permanently ineligible for any benefits under the INA. This means that in addition to being declared ineligible for asylum, such a person would be removed from the United States as quickly as possible without any possibility of ever returning lawfully, regardless of the individual's circumstances.